No. 47789-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

BUCK THOMPSON,

Petitioner,

v.

KATIE HOLT (FKA ACKERLUND)
Appellant

ON REVIEW FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR PIERCE COUNTY

OPENING BRIEF OF APPELLANT

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I. INTRODUCTION

The trial court had zero admissible evidence upon which to find that the children were mentally and physically abused in the mother's care and should therefore be reversed.

II. ASSIGNMENTS OF ERROR

Assignments of Error

1. The trial court erred when it admitted into evidence Exhibit 13 the Declaration of Colleen Hicks.

2. The trial court erred when it allowed Chaplain Fry to authenticate Exhibits 4, 5, 6, 8A, 9 and 10 telephonically when he could not even see the documents he was allegedly authenticating.

3. The trial court erred when it allowed the petitioner, Buck Thompson and his new wife Brandy Thompson to repeat child hearsay with no exception to Er 802 that would allow the admissibility of such statements.

4. The trial court erred when it failed to follow the recommendations of the Guardian ad Litem which were supported by substantial evidence.

5. The trial court erred when it made the finding that the children were physically and mentally abused in the mother's home.

Issues Pertaining to Assignments of Error

1. There is no applicable exception to the hearsay rule ER 802 that would allow the trial court to admit the Declaration of Colleen Hicks into evidence.

2. It is reversible error for the trial court to have allowed

Chaplain Fry to have purportedly authenticated documents through telephonic testimony that he could not see.

3. There is no applicable exception to the hearsay rule, ER 802 that would allow the Petition Buck Thompson and his new wife Brandy Thompson to testify as to what the children told them allegedly occurred while they were in the care of the mother. Further, for reasons known only to Buck Thompson and his lawyer, the children were not listed as witnesses and did not testify at trial.

4. The trial court should have relied upon the recommendations of the Guardian ad Litem which was supported by substantial evidence.

5. There was no admissible evidence upon which the court could find a detrimental environment in the mother's home. As such, not only was there no substantial evidence supporting the trial court's findings of fact that the children were mentally and physically abused in the mother' s home, but there was zero evidence of such.

III. STATEMENT OF THE CASE

Katie Holt and Buck Thompson, both now 32 years of age, were married in 2007 and divorced in Alaska in 2011. CP 3. There are three children of the marriage, Tyson now 11, Korie now 10 and Colton now 9 years of age.

A custody decree/parenting plan/residential schedule was entered on September 6, 2011 in Alaska which provided that Katie

would have the children 60% of the time and Buck would have the children 40% of the time. CP 3.

After the divorce, Katie moved with the children to Washington, back to Alaska (for an attempted reconciliation with Buck), then Arizona and finally to Florida. CP 3. In the fall of 2012, the mother was living in an apartment and the children attended Antioch Elementary. CP 3. Buck visited the children for Christmas 2012 and then did not have an in-person visit with the children until he took the children for his summer visitation in June 2013. CP 3-4. From the divorce in 2011 through Buck's summer visitation in 2013, Buck only had one overnight with the children. CP 4.

During the court's oral ruling after trial in this matter on May 7, 2015 the trial judge stated, "Another finding that the Court makes is that the children were doing well with the mother while in her care." RP 234 at lines 20-21.

During this period of non-visiting by Buck, he repeatedly threatened to have Katie's new husband, Christopher (Holt) adopt the children. CP 3, and Ex. 56, pages 13-16, and RP 54. During this time period Buck referred to Katie as a "retard" and his children as "bastards". RP 55.

Buck routinely referred to Katie's new husband, Christopher Holt as a "nigger." RP 54, lines 22-24.

Buck Thompson picked up the children for his summer visitation at 11 am on June 4, 2013. RP 42 The children were last allowed by Buck to see their mother Katie, in person, on June 8,

2013. RP 131. The children were last allowed by Buck to speak to their mother on the telephone on February 24, 2014. RP 132.

Buck Thompson testified that at the end of June, beginning of July 2013 the children, for the first time, made disclosures of physical and mental abuse while in the care of Katie. RP 43-44. The trial court allowed this testimony over the objections of Katie's attorney for lack of foundation and hearsay. RP 44-45. In fact, Katie's attorney repeatedly objected to Buck's testimony about what the children stated on the basis of lack of foundation and hearsay and was overruled by the trial court each and every time. RP 44-53.

There were no disclosures of specific physical, mental or sexual abuses made by any of the children to Buck. RP 37-65. There was no disclosure of sexual abuse until December 27, 2014. RP 50 at lines 8-10.

For reasons known only to Buck and his lawyer, Buck Thompson did not list the children as witnesses on any witness list and did not call the children as witnesses during trial. RP 45 at lines 16-17 and CP 60.

Buck Thompson, with no consultation with Katie whatsoever and without her knowledge, enrolled the children in counseling with Colleen Hicks in July 2013. RP 46-47. The children attended counseling with Ms. Hicks for six weeks. RP 46 at 15-16. Ms. Hicks was a counselor Buck found on the internet. RP 46 at 9.

Colleen Hicks was not ever disclosed as a witness and she did not testify at trial. RP 58, CP 53-54 and 60.

Yet shockingly, and in direct violation of every applicable rule of evidence, case law and public policy, the trial court allowed into evidence, over the zealous objections of Attorney Benjamin based upon hearsay, lack of authentication, lack of foundation, that Petitioner was trying to get the document admitted to prove the truth of the matter asserted without the ability to cross-examine, Exhibit 13 the Declaration of Colleen Hicks. RP 46 line 25, RP 47 lines 1-14, RP 217 lines 6-25 and RP 218 lines 16[1].

During the six weeks the children were seeing Counselor Hicks, the Army changed its insurance program and no longer covered her services, so the children changed counselors, again with no knowledge of Katie, to unlicensed student interns in the office of Chaplain Fry. RP 46 at lines 11-15 and RP 118. The children were "counseled" by these unlicensed student interns from September or October 2013 to June 2014. RP 48, lines 10-12.

None of the unlicensed student interns who "counseled" the children were listed as witnesses by Buck and did not testify as witnesses at trial. CP 53-54 and CP 60.

Chaplain Fry was not listed on any witness list filed by Buck. CP 53-54 and RP 67 at lines 10-11. Further, Buck's attorney did

[1] It must be pointed out that there is an error in the Report of Proceedings (or in the actual statements of Attorney Page/trial court) when the Declaration of Colleen Hicks is referred to as Exhibit 14 on RP 46-47, when in all actuality it is Exhibit 13. See the Exhibit Record at CP 58 showing the ONLY Declaration of Colleen Hicks is Exhibit 13 and Exhibit 14 is the Declaration of Chaplain Fry.

not provide copies of the 127 pages of "counseling" records from Chaplain Fry's office until April 27, 2015—barely one week prior to trial. RP 67-68 and RP 98. ***It must be pointed out that there is an error in the Report of Proceedings on Page 67 at lines 2-10 were actually stated by Mr. Page NOT Mr. Benjamin who spoke at lines 10-20.***

The trial court seemed quite hostile to the idea of any TIMELY DISCLOSED witness testifying telephonically when Katie's attorney Mr. Benjamin inquired of such in his opening statement at RP 5 lines 11-17 when the trial court states summarily "Probably not." RP 5, line 17.

However, as soon as Buck's attorney, Mr. Page desperately needed Chaplain Fry who was an UNDISCLOSED witness to testify telephonically, the trial court accommodated him. RP 110, lines 9-11. After the direct testimony of Chaplain Fry by telephone, Chaplain Fry admitted on cross-examination by Attorney Benjamin as to Exhibits 4, 5, 6, 8A, 9 and 10, "I supplied them. I physically am not seeing them now." Attorney Benjamin followed up, "Right, so you don't know which records to which he's referring?" Chaplain Fry replied, "Correct." RP 118, lines 6-9.

After the testimony of Chaplain Fry concluded, Attorney Benjamin objected to the admissibility of Exhibits 4, 5, 6, 8A, 9 and 10 stating, "First off, the witness [Chaplain Fry] admitted under oath he cannot see what records to which Mr. Page is referring. He

[Chaplain Fry] does not know what Exhibits 1 through 8 are." RP 120, lines 4-8.

Again, shockingly, and in direct violation of every applicable rule of evidence, case law and public policy, the trial court allowed into evidence, over the zealous objections of Attorney Benjamin based upon hearsay, lack of authentication, lack of foundation, that Petitioner was trying to get the documents admitted to prove the truth of the matter asserted without the ability to cross-examine, Exhibits 4, 5 and 6 and Exhibits 8A, 9 and 10. RP 48-50, RP 66-69, RP 96-105, RP 128-131, and RP 217-218.

The trial court stated, "I think the proper foundation has been made [by Chaplain Fry] for the records custodian to authenticate the records. ***The Court takes a huge leap of faith*** that the records that were presented on the U.S. Department of Army letterhead and pages are in fact the records provided to Mr. Page, even though the witness, as Mr. Benjamin indicated, cannot physically view the exhibits and authenticate them in that fashion." [Emphasis supplied]. RP 124, lines 16-23.

The only abuse disclosed directly to Buck by any of the children is as follows:

> *"I will have to break you and Brandy up, because if not, I will be – go back down and I will be physically abused."*

And Buck clarified a few moments later that the child actually stated "beat" rather than "abused". RP 45.

Attorney Benjamin objected to this testimony on the basis of rank hearsay and was overruled by the trial court. RP 45.

And the only abuse disclosed directly to Brandy by any of the children is as follows:

> *"And he [Tyson] said, 'I was told by my mom, Katie, that if I did not break you and dad up, I would get beat when I got back.'"* RP 79.

Attorney Benjamin objected to this testimony on the basis of hearsay and double hearsay and was overruled by the trial court without explanation. RP 79-80.

> *"Well, I go hit in the head with the brush if I would pull away." And, ". . . she [Korie] said, 'Could you flat iron my hair?' And I [Brandy] said, 'Well, I don't think I really want to.' She [Korie] 'Well, it's okay. My mom hit me in the face with her's [sic] any way.'"* RP 81.

Attorney Benjamin objected to this testimony on the basis of rank hearsay and was overruled by the trial court. RP 80, lines 9-12.

> *"Korie stepped up and said, 'We were told to touch people in inappropriate places.'"* RP 81-82.

Attorney Benjamin objected to this testimony on the basis of rank hearsay and was overruled by the trial court. RP 82.

Buck, through counsel, filed a major modification of the parenting plan on February 28, 2014. CP 55. On that same date he, through counsel, obtained an ex parte restraining order restraining Katie from the children. Exhibit 64.

On May 29, 2014, Buck, through counsel, obtained a temporary order granting Katie zero contact with the children. Exhibit 65.

The Guardian ad Litem Christine Kerns has a background of being a CPS investigator. RP 25, Exhibit 55 page 15. She has been a CPS supervisor and program manager over the past ten years. RP 25, Exhibit 55, page 15.

GAL Kerns testified that Army Criminal Investigation Division (CID) did a "very in depth" investigation into whether the children were abused while in Katie's care. RP 28. She testified that Chaplain Fry alluded to the fact that the children had been coached. RP 28.

Agent Graham who headed the CID investigation performed several hours of interviews with Katie, her associate Travis and her new husband Christopher Holt. RP 27. She further testified that Agent Graham reviewed the records of the children's schools in Alaska, Florida and had other collateral contacts. RP 27.

GAL Kerns was highly critical of Colleen Hicks. RP 28-29.

GAL Kerns believed the children have been coached by Buck and/or his wife Brandy. RP 29.

Ultimately, GAL Kerns recommended that the children be returned to Katie full-time as the primary parent and that the contact between Buck and the children be supervised and/or in a therapeutic setting. Exhibit 66.

Buck testified that he wants no contact between his children and Katie. RP 53 at lines 17-18.

Based almost solely upon the counseling records of Colleen Hicks and the "counseling" records of the unlicensed student interns in Chaplain Fry's office, Buck proved there was a detrimental environment in Katie's home and "the balancing is tipped in favor of the father for the children to remain in his home." RP 229-230.

The trial court denied the father's petition on the basis of integration. RP 230 at lines 11-15.

IV. LEGAL AUTHORITY AND ARGUMENT

A. Standard of Review.

Trial court decisions made with respect to modification or adjustment of a parenting plan are discretionary, with the court on appeal applying the abuse of discretion standard. In re Marriage of McDole, 122 Wn.2d 604, 859 P.2d 1239 (1993). The family law statutes confer a great deal of discretion upon trial courts, with the trial court simply required to 1) determine the legally relevant factors upon which to make a discretionary decision, 2) find facts relevant to the legally relevant factors, and then 3) exercise discretion based upon its findings. In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997).

The appellate court will not overturn the trial court's findings of fact that are supported by substantial evidence; that is "evidence sufficient to persuade a rational fair-minded person that a finding is true." Casterline v. Roberts, 168 Wn. App. 376, 381, 284 P.3d 743

(2012); see also Beeson v. Atlantic-Richfield Co., 88 Wn.2d 499, 503, 563 P.2d 822 (1997) (an appellate court will not ordinarily substitute its judgment for that of the trial court even if it might have resolved the factual dispute differently). Even if there are errors, the appellate court won't reverse a trial court decision unless the error materially affected the outcome or involved an important issue of procedural justice. Capen v. Wester, 58 Wn.2d 900, 902, 365 P.2d 326 (1961); see also In re Marriage of Landry, 103 Wn.2d 807, 809-10, 699 P.2d 214 (1985) (trial court decisions in dissolution actions are affirmed unless no reasonable judge would have reached the same conclusion).

1. Substantial Evidence

Nonetheless, a trial court may modify a parenting plan if a substantial change has occurred in the circumstances of the child or the nonmoving party, and such modification is necessary to serve the best interests of the child. RCW 26.09.260(1). We uphold the trial court's findings of fact if supported by substantial evidence. *McDole,* 122 Wash.2d 604, 859 P.2d 1239, *Chapman v. Perera,* 41 Wash.App. 444, 704 P.2d 1224. *In re the Marriage of Velickoff*, 95 Wn. App. 346, 352-353 (1998).

Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth of the declared premise. *American Nursery Prod. Inc. v. Indian Wells Orchards,* 115 Wash.2d 217, 222, 797 P.2d 477 (1990).

In the case at bar, there is zero admissible evidence to show any detrimental environment in the mother's home.

2. The Trial Court Based It's Findings of Fact and Conclusions of Law Solely Upon Inadmissible Evidence and there was Zero Admissible Evidence of a Detrimental Environment in the Mother's Home, Let Alone "Substantial Evidence."

The trial court had the following evidence of detrimental environment:

(1) A single inadmissible hearsay statement of a child testified by Buck (See above);

(2) Three inadmissible hearsay statements of two children testified by Brandy (Buck's new wife) (See above);

(3) The inadmissible hearsay declaration of Colleen Hicks (Exhibit 13); and,

(4) The inadmissible hearsay statements contained in Exhibits 4, 5, 6, 8a, 9 and 10.

3. There is No Applicable Exception to the Hearsay Rule to allow the admission of items 1 through 4 enumerated above.

There is no applicable exception to the hearsay rule that would allow the inadmissible hearsay into evidence. Attorney Benjamin zealously objected every single time and was overruled, generally without explanation, by the trial court.

a. Business Record Exception:

There was some minor comments by the trial court that the declaration of Colleen Hicks and Exhibits 4, 5, 6, 8a, 9 and 10 may

have met the "business records" exception to the hearsay rule. RP 49, lines 11-19.

Firstly, to dispense with the declaration of Colleen Hicks, Ms. Hicks did not testify and neither did any other person as a "records custodian" who could have possibly authenticated any part of Exhibit 13. It is rank hearsay and fits under no exception. Ms. Hicks was not listed as a witness at any time by Buck and she was not made available for cross-examination.

Secondly, to secure the admissibility of a business record, the proponent must show, as a matter of foundation:

(1) that the entity in question qualifies as a business;

(2) that the record was made in the regular course of business by someone employed by the business;

(3) that the record was made at or near the time of the act, condition, or event;

(4) that the record describes an act, condition, or event;

(5) that the record has been since maintained as a record of the business by a person authorized to do so;

(6) that the surrounding circumstances suggest the record is reliable; and,

(7) that the record in question is indeed a actual record of the business entity in question; *i.e.*, the record must be identified and authenticated by a witness with the proper qualifications.

5C Karl B. Tegland, Washington Practice: Evidence Law and Practice § 803.42, at 23 (5th ed.).

In *State v. DeVries*, 149 Wn.2d 842, 72 P.3d 748 (2003), the Supreme Court of Washington found the trial court abused its discretion in allowing a purported records custodian to authenticate records telephonically without being able to view the records being "authenticated." The Court stated:

> The UBRA provides an exception for business records to the general hearsay rules. RCW 5.45.020. This court has interpreted the UBRA as applying to medical records and has set forth criteria to ensure the reliability of these records. See *State v. Ziegler,* 114 Wash.2d 533, 538–40, 789 P.2d 79 (1990). While the UBRA is a statutory exception to hearsay rules, it does not create an exception for the foundational requirements of identification and authentication. 5C Karl B. Tegland, Washington Practice: Evidence Law and Practice § 803.42, at 23 (4th ed.1999). A trial court's decision to admit records under the act is reviewed for a manifest abuse of discretion. *Ziegler,* 114 Wash.2d at 538, 789 P.2d 79.
>
> In this case, exhibit 1 was a laboratory report of the urine test, which the State contended was from the victim, Mannen. The State introduced the report through the emergency room doctor, who testified by phone. Critically, the doctor did not have a copy of the report before him to consult while testifying. He could not say that the report he had seen previously on October 25, 1999, while treating Mannen, was the same one that the prosecution sought to admit. The identification of exhibit 1 was further confused by the prosecutor's repeated reference to the exhibit as a blood test. Mannen did have a blood test but it was only the urine test that was screened for drugs.
>
> Because the exhibit was not properly identified and authenticated by a witness, it was a manifest abuse of discretion for the trial court to admit it into evidence.
>
> It is possible that upon a proper foundation the doctor could have offered an opinion as to the

> condition for which he treated his patient. But that is not the question before us. The doctor was never asked for his expert opinion. The trial judge, perhaps frustrated by persistent foundation objections of defense counsel, asked the critical question himself:
>
> THE COURT: You can go ahead tell us what the drug screen said.
>
> A. It was positive for amphetamines.
>
> RP at 90.
>
> The trial court abused its discretion in admitting the laboratory report without proper foundation.

State v. Devries, 149 Wn.2d 842, 848 72 P.3d 748 (2003).

Based upon Devries, it was reversible error for the trial court to allow Chaplain Fry to authenticate Exhibits 4, 5, 6, 8A, 9 and 10.

4. <u>Because the Trial Court had No Other Admissible Evidence as to Alleged Detrimental Environment in Mother's Home, the Trial Court's Admission of the Inadmissible Evidence was not Harmless Error.</u>

The United States Supreme Court has held that it is reversible error for the judge in a bench trial to expressly rely upon inadmissible hearsay in a criminal case. *Moore v. U.S.*, 429 U.S. 20, 97 S. Ct. 29, 50 L. Ed. 2d 25 (1976). The same should apply to a non-criminal case involving such important Constitutional rights as the ability to parent one's own children.

5. <u>The Appellant Katie Holt is Challenging the Trial Court's Following Findings of Fact and Conclusions of Law and Not Being Supported by Substantial Evidence.</u>

The children's environment under the custody decree/parenting plan/residential schedule is detrimental to the children's physical, mental or emotional health and the harm likely

to be caused by a change in environment is outweighed by the advantage of a change to the children.

2.2.2 During the summer 2013 residential time the children revealed a series of chronic abuse events including physical, emotional and sexual in nature. The perpetrator was revealed to be the mother as far as the children were concerned.

2.2.3 The mother admitted to spanking with a plastic spoon, rough hair bruising, and an incident regarding the child being thrown against their will into a pool.

2.2.4 The children sought counseling with Colleen Hicks, LMFT and Chaplain Stephen Fry and his interns. Both counselors recommended specific treatment plans and both suggested that the children were not coached.

2.7.1 The allegations of the children of chronic physical, sexual and emotional abuse were not disclosed at the time of the last parenting plan and the mother's denial does not diminish the severity of those allegations.

2.7.2 The children do not want to go back to their mothers care due to the abuse and potentially other reasons.

2.7.3 The number and variety of the allegations the children reported to everyone were consistent with specific details and that does suggest they were not coached. While there may have been some exaggerations by the children, the non-exaggerations of the children found by their counselors, who are found to be credible, lead to a substantial change in circumstance. The court cannot however dismiss the serious allegations of physical abuse or sexual abuse that may have happened.

2.7.4 The Petitioner satisfied the burden of proof under the detriment environment basis.

B. <u>Custodial Continuity is Favored.</u>

Legislative policy is in favor of finality of custody determinations. *E.g., In re Marriage of Thompson,* 32 Wash.App. 418, 421, 647 P.2d 1049 (1982) (dissolution statutes seek to (1) maximize finality of custody awards to avoid repeated litigation of

custody issues, (2) prevent "ping-pong" custody litigation, and (3) preserve basic policy of custodial continuity); *In re Marriage of Roorda*, 25 Wash.App. 849, 851, 611 P.2d 794 (1980) ("strong presumption" in statutes and case law in favor of custodial continuity and against modification). The legislature, likewise, has stated that one of its policies behind the custody statutes is to limit disruption to the children: "Further, the best interest of the child is ordinarily served when the existing pattern of interaction between a parent and child is altered only to the extent necessitated by the changed relationship of the parents or as required to protect the child from physical, mental, or emotional harm." RCW 26.09.002 (partial). The stability of the child's environment is of utmost concern, *Schuster v. Schuster*, supra, 90 Wash. at 628, 585 P.2d 130. Custodial continuity is of paramount importance since custodial changes are viewed as highly disruptive for the child, *In re Marriage of Roorda*, supra, 25 Wash.App. at 851, 611 P.2d 794; *Anderson v. Anderson*, supra 14 Wash.App. at 368, 541 P.2d 996.

C. Child Custody Litigation is Inherently Harmful to Children.

Legislative policy is in favor of finality of custody determinations. *E.g., In re Marriage of Thompson,* 32 Wash.App. 418, 421, 647 P.2d 1049 (1982) (dissolution statutes seek to (1) maximize finality of custody awards to avoid repeated litigation of custody issues, (2) prevent "ping-pong" custody litigation, and (3) preserve basic policy of custodial continuity); *In re Marriage of*

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D. The trial court should have adopted the recommendations of the Guardian ad Litem which were supported by substantial evidence.

The trial court remains free to ignore the recommendations made by the guardian ad litem if they are **not** supported by other evidence or it finds other testimony more persuasive. *In re Guardianship of Stamm*, 121 Wn.App. 830, 836, 91 P.3d 126 (2004); *Fernando v. Nieswandt*, 87 Wn.App. 103, 107, 940 P.2d 1380 (1997).

In the case at bar, the Guardian ad Litem recommended that the children be placed back in the primary care of the mother

forthwith. Exhibit 66. Further, the GAL's investigation relied upon the extensive investigation of Army CID which concluded that Buck Thompson and/or his new wife Brandy coached the children and that the children had not been physically or mentally abused in the mother's care. Further, the GAL's investigation relied upon her interviews of the children and her extensive experience working for Child Protective Services. RP 25-30

E. Detrimental Environment.

In determining whether a substantial change has occurred, the court looks to the factors in RCW26.09.260(2), one of which is whether "[t]he child's present **environment** is detrimental to the child's physical, mental, or emotional health and the harm likely to be caused by a change of **environment** is outweighed by the advantage of a change to the child." RCW 26 09.260(2)(c).

In the case at bar, there is zero evidence, let alone substantial evidence that the children's environment was detrimental in the mother's home.

V. CONCLUSION

Based upon the foregoing, the trial court should be reversed and the children placed back in the primary care of the mother forthwith.

Dated this 22nd day of February, 2016.

JASON P. BENJAMIN, WSBA#25133
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on the 22nd day of February, 2016, I caused a true and correct copy of this Brief of Appellate to be served on the following in the manner indicated below:

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